

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rock Front Ranch Products

Serial No. 87819103

Francis J. Ciaramella of Francis J. Ciaramella, PLLC
for Rock Front Ranch Products.

John T. Billings, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

Before Wellington, Kuczma, and Lebow,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Rock Front Ranch Products (“Applicant”) seeks registration on the Principal
Register of the mark:



for “dried jujube fruit” in International Class 29. The word JUJUBES has been disclaimed.¹

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with thirteen JUST [fruit name]-formative registered marks. The cited registrations are:

| REG. NO. | MARK | GOODS |
|----------|-------------------|---|
| 4661755 | JUST GRAPES | “dried fruit and vegetables” |
| 4647461 | JUST CRANBERRIES | “dried fruit and vegetables, namely, dried cranberries” |
| 4647460 | JUST CHERRIES | “dried fruit and vegetables, namely, dried cherries” |
| 4647459 | JUST BLUEBERRIES | “dried fruit and vegetables, namely, dried blueberries” |
| 4439586 | JUST STRAWBERRIES | “dried fruit and vegetables” |

¹ Application Serial No. 87819103 was filed March 3, 2018, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s allegation of first use the mark anywhere on January 1, 2016, and in commerce on January 1, 2018. The mark is described in the application as:

[T]wo words stacked, JUST JUJUBES. in stylized brown font, except for the J in JUST and the second J in JUJUBES., which are stylized as a single letter in the color red with a green leave extending to the left of the top of the letter, the tittle over the first J in red and the period in red; all of which appears on a white background.

| REG. NO. | MARK | GOODS |
|----------|------------------------------------|------------------------------|
| 4439584 | JUST STRAWBERRIES 'N BANANAS | “dried fruit and vegetables” |
| 4436076 | JUST RASPBERRIES | “dried fruit” |
| 4439583 | JUST POMEGRANATE | “dried fruit” |
| 4439582 | JUST PINEAPPLE | “dried fruit” |
| 4436075 | JUST PEACHES | “dried fruit” |
| 4439572 | JUST BANANAS | “dried fruit and vegetables” |
| 4439569 | JUST APPLES | “dried fruit and vegetables” |
| 4333534 | JUST MANGO | “dehydrated fruit snacks” |

All of the cited registered marks are in standard characters, with a disclaimer of the name of the fruit in the mark, e.g., GRAPES, CRANBERRIES, CHERRIES, etc. The same entity, Just Tomatoes, Inc. (“Registrant”), owns the registrations.

After the Examining Attorney made the refusal final, Applicant appealed and filed a request for reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal resumed and has been briefed.

For the reasons set forth below, we affirm the refusal to register.

I. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*DuPont* factors”); *see also In re Majestic*

Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Relatedness of the Goods and Their Trade Channels

We begin our analysis with the *DuPont* factors regarding the similarity or dissimilarity of the goods, *DuPont*, 177 USPQ at 567, and the “similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* We base our determinations in connection with these factors on the “nature of the goods or services as described in an application or registration[s].” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

All but three of the cited registrations are for “dried [or dehydrated] fruit” and this term is broad enough to include Applicant’s “dried jujube fruit.”² Thus, for purposes of comparison of these goods, they are legally identical. *See In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded

² A “jujube” is a “small sweet greenish to red fruit ... also called Chinese date.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th Edition 2020). Copy of definition attached to Office Action issued April 6, 2020.

identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture”). As to the three cited registrations that identify a certain dried fruit, i.e., cranberries, cherries and blueberries, these goods are also related to Applicant’s dried jujube fruit to the extent that they are all dried fruit and may be eaten as snacks. The Examining Attorney submitted evidence showing that, like other dried fruit, “freshly harvested, as well as candied dried [jujube] fruit, are often eaten as a snack, or with coffee.”³ The Examining Attorney also submitted evidence demonstrating that dried jujubes and other dried fruit like that offered by Registrant are advertised on the same retail websites.⁴

Where, as here, the goods are in part legally identical because one listed item encompasses another, we presume that the channels of trade and classes of purchasers for those identical goods are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods or services, the channels of trade and classes of purchasers are considered to be the same); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

³ From online dictionary Wikipedia (www.en.wikipedia.org); printouts attached to Office Action issued April 6, 2020.

⁴ See, e.g., printouts from Nuts.com website attached to April 6, 2020 Office Action, TSDR pp. 40-47.

Accordingly, the second and third *DuPont* factors weigh heavily in favor of finding likelihood of confusion.

B. Alleged Weakness of Shared Term JUST

The sixth *DuPont* factor considers “[t]he number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. “Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005), *quoted in Jack Wolfskin Ausrüstung Für Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015).

Applicant argues “there is no evidence that the cited Prior Marks are famous or have acquired secondary meaning within the marketplace or that consumers associate the term JUST with the [Registrant]. To the contrary, ... there are many marks containing the word JUST for use with fruit-related goods and services, and the [Registrant] represents a minuscule percentage of such trademarks.”⁵ Applicant further contends that because “other marks besides those belonging to the Applicant and [Registrant] have used the word JUST for use with fruit-related goods and services ... it cannot be said that Applicant’s mark will create a likelihood of

⁵ 6 TTABVue 10.

confusion.”⁶ In support, Applicant submitted copies of thirty-three, third-party registrations for marks that have the term JUST and covered fruit-related products.⁷

Upon review of the third-party registration evidence, we note that only one (JUST GRAPES AND SUN) is for dried fruit, and one other registration (JUST ENOUGH) is for “trail mix consisting of dried fruit and chocolate.” All of the other registrations are for different fruit products, such as: fresh/frozen/processed fruit, confections, juices or beverages, purees, salads, etc. Thus, while one third-party registration is for the same goods as those at issue, the others have much less of a relationship. As the Federal Circuit has emphasized, the relevant inquiry under the sixth *DuPont* factor is the number and nature of similar marks on similar goods. *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693-94 (Fed. Cir. 2018) (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874 , 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

In addition, as the Examining Attorney points out, twelve of the third-party registrations for marks that do have a similar JUST (with name of fruit) structure are owned by a single entity, Smucker Natural Foods, Inc., and are for fruit drinks or juices.⁸ Thus, not only do these registrations cover different goods, but the fact that a

⁶ Id. at 11.

⁷ Printouts for registrations from Office electronic database (TESS) attached to Request for Reconsideration filed October 6, 2020.

⁸ The Examining Attorney lists the twelve registrations at 8 TTABVue 15-16. The registered marks include JUST GRAPEFRUIT, JUST PINEAPPLE, JUST TART CHERRY, JUST BLUEBERRY, etc.

single entity owns them diminishes any notion that JUST [fruit name] marks are owned by many different entities.

We further note that there is no evidence regarding whether the third-party registered marks are actually in use in commerce. “Applicant’s citation of third-party registrations as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) *quoted in Sock It To Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, *9 (TTAB 2020). The third-party registrations, with no evidence of the extent of their use in commerce, do not diminish the commercial strength of Registrant’s marks. *Id.* “We have frequently said that little weight is to be given such [third-party] registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them....” *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) *quoted in In re Inn at St. John’s*, 126 USPQ2d at 1746 (TTAB 2018).

In terms of conceptual strength of the term, third-party registration evidence may be probative. “[E]vidence of third-party registrations is relevant to show the sense in which a mark is used in ordinary parlance, ... that is, some segment that is common to both parties’ marks may have a normally understood and well-recognized

descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak....” *Jack Wolfskin*, 116 USPQ2d at 1136 (citing *Juice Generation*, 115 USPQ2d at 1675). As the Examining Attorney points out, many of third-party registered marks show the term JUST used in various different contexts and imparting very different connotations, e.g., JUST SMILE, JUST OUR SECRET, JUST ABOUT, JUST PRESSED, JUST MADE, JUST PIK’T, etc. However, several of the third-party registered marks, particularly the twelve owned by Smucker Natural Foods, Inc., employ the JUST [name of fruit] structure that Applicant and Registrant use, and this helps show such marks may impart a suggestive connotation, namely, to signify that the focus of such goods is only (“just”) on the fruit name in the mark. Again, the probative value of these registrations is only to show some conceptual weakness in the marks based on their suggestive nature in connection with food or beverages, in general. *Textronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976).

In sum, there is no showing of commercial weakness under the sixth *DuPont* factor. However, there is some conceptual weakness in the term JUST when followed by a name of a fruit, and this weighs against a likelihood of confusion.

C. Comparison of the Marks

We now compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks

can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). There is nothing improper in stating that, for rational reasons, we have given more or less weight to a particular feature of a mark, such as a common element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (*citing In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)).



Applicant's mark, again, is and the cited registered marks are JUST GRAPES, JUST CRANBERRIES, JUST CHERRIES, JUST BLUEBERRIES, JUST STRAWBERRIES, JUST STRAWBERRIES 'N BANANAS, JUST RASPBERRIES, JUST POMEGRANATE, JUST PINEAPPLE, JUST PEACHES, JUST BANANAS, JUST APPLES, and JUST MANGO.

Here, Applicant's mark is overall very similar to each of the registered marks because they all share the same word structure—JUST [name of a fruit].⁹ Although we have found this JUST [name of fruit] word structure to be suggestive of food goods,

⁹ Only the registered mark JUST STRAWBERRIES 'N BANANAS differs slightly in this formula because it contains the names of two fruits.

we note that this also brings Applicant's and Registrant's marks closer in terms of their commercial impressions. Despite any conceptual weakness, consumers perceiving such a connotation and already familiar with Registrant's JUST-formative marks for different dried fruit, are likely to mistakenly believe that Applicant's mark is simply an extension of that line. Put differently, consumers will not rely on the names of the different fruits in the marks, but are more likely to notice the term JUST in each of the marks because it is also the only inherently distinctive word in the marks. *See Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011) ("[W]hen a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term.")

We do not ignore the font stylization and letter J with a leaf design in Applicant's mark. Indeed, the letter J design appears large and is centered in Applicant's mark to connect the terms JUST and JUJUBES. This is a difference; however, we also keep in mind that with marks "consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used to request the goods." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (citing *In re Viterro Inc.*, 101 USPQ2d at 1908). The stylized font for the wording in Applicant's mark does not distinguish it from the cited marks because the registered marks are in standard character format and may be displayed in the same exact font as Applicant's mark. *In re Viterro Inc.*, 101 USPQ2d 1909-11 (holding that the specific font style of a mark

cannot serve as the basis to distinguish it from a mark in standard character form); *In re Aquitaine Wine USA, LLC*, 2018 TTAB LEXIS 108, 126 USPQ2d 1181, 1186 (TTAB 2018) (literal elements of a standard character mark may be presented in any font style, size or color). Moreover, the J letter with leaf design does not significantly alter or detract from the commercial impression conveyed by wording; at best, it may suggest a natural quality of the dried jujube fruit because it grows on a tree like many other types of fruit. Thus, “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar.” See *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

In sum, the identity of the same first word and word structure makes the marks overall very similar and outweighs the differences between the marks. Accordingly, this *DuPont* factor weighs in favor of likely confusion.

D. Lack of Actual Confusion

Finally, Applicant argues that “there has been no documented evidence that shows that any consumers have confused the respective marks in commerce. There have been no demonstrated events of confusion by consumers between the respective marks.”¹⁰

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant and Registrant of their marks

¹⁰ 6 TTABVUE 10.

for a significant time in the same markets. *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to occur.

Here, Applicant only alleges use of its mark in commerce as of January 1, 2018. There is no probative evidence relating to the extent Applicant and Registrant have used their respective marks since 2018 for us to find that there has been real opportunity for instances of actual confusion to have occurred in the marketplace. Thus, we cannot make any conclusions in this regard based solely on Applicant's mere assertion of no instances of actual confusion. In any event, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003). "[I]t is unnecessary to show actual confusion in establishing likelihood of confusion." *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). This *DuPont* factor is neutral.

II. Conclusion

Despite some conceptual weakness in their shared word structure, JUST [name of fruit], we find Applicant's mark and Registrant's marks are overall very similar, such that when they are used on identical goods that move in the same channels of trade to the same classes of customers, confusion is likely.

Decision: The refusal to register Applicant's mark is affirmed.